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IN THE

Supreme Court of the United States

October Term, 1964

No. 227

MARGARET DAVIS, *et al.*,

Petitioners,

vs.

PAULINE D. McLAUGHLIN, Administratrix *de bonis non* of the Estate of Ingram M. Stainback, deceased.

Respondent.

Brief of Respondent in Opposition to Petition for Writ of Certiorari.

To the Honorable Earl Warren, Chief Justice of the United States, and the Honorable Associate Justices of the Supreme Court of the United States:

Respondent Pauline D. McLaughlin, Administratrix *de bonis non* of the Estate of Ingram M. Stainback, Deceased, in response to the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, respectfully suggests that no sufficient grounds exist for the granting of said petition because:

(1) This case presents no "special and important reasons" of the character specified in Rule 19 of the Revised Rules of this Court as grounds for granting a writ of certiorari.

(2) The Court of Appeals for the Ninth Circuit committed no error in affirming the judgment of the District Court for the District of Hawaii.

Opinion Below and Statement of Jurisdiction.

The opinion of the Court of Appeals for the Ninth Circuit in this action is reported as *Davis v. McLaughlin*, 326 F. 2d 881 (9th Cir. 1964).

This action was commenced in the United States District Court for the District of Hawaii by petitioners as plaintiffs against the late Judge J. Frank McLaughlin, Administrator of the Estate of Ingram M. Stainback, Deceased. Jurisdiction was based on alleged diversity of citizenship and amount in controversy, 28 U. S. C. Sec. 1332 [See par. 1 of the Complaint, R. p. 3]. Subsequent to the commencement of this action, Pauline D. McLaughlin, Administratrix *de bonis non* of the Estate of Ingram M. Stainback, Deceased, was substituted as defendant in place of the late Judge McLaughlin [R. pp. 32-33].

The judgment of the court of appeals was filed and entered January 22, 1964 [R. Vol. 1]. On April 2, 1964, the petition of petitioners for a rehearing by the Court of Appeals was denied [R. Vol. 1]. Although petitioners have not so stated, they apparently invoke the jurisdiction of this Court under 28 U. S. C. Secs. 1254 and 2101.

Questions Presented.

Petitioners raise but one issue: Did the district judge err in ruling that petitioners could not voluntarily dismiss this action without prejudice under Rule 41-(a)(1) of the Federal Rules of Civil Procedure, but could voluntarily dismiss without prejudice only under

Rule 41(a)(2) "upon order of the court and upon such terms and conditions as the court deems proper", and did the district judge commit an *abuse of discretion* in setting the terms and conditions of such a dismissal and ordering this action dismissed with prejudice upon petitioners' failure to comply with those terms and conditions?

Summary of Respondent's Argument.

Petitioners do not attempt to demonstrate that any reasons of the character specified in Rule 19(b) of the Revised Rules of this Court for granting a writ of certiorari exist in this case. In fact, there is no reason for this Court to review the judgment of the court of appeals below. The district judge correctly held that the only basis for a voluntary dismissal by plaintiffs (petitioners here) was under Rule 41(a)(2) of the Federal Rules of Civil Procedure, because a motion to dismiss which tendered issues going to the merits of the action, which referred to matters outside the pleadings and which was in effect a motion for summary judgment, had been filed by defendant (respondent here). (See Fed. R. Civ. P. Rule 12(c).) The district judge acted in accordance with long-established precedent in specifying as the condition of a dismissal without prejudice that petitioners reimburse respondent for a *part* of her expenses and attorneys' fees, and in dismissing this action with prejudice when petitioners failed to comply with such condition. In the circumstances of this case, the condition set by the district judge was not an abuse of discretion.

Petitioners have not presented a complete statement of all pertinent facts. For this reason, and for the

further reason that a full statement of the facts will, better than any other argument, demonstrate that no reason exists to grant a writ of certiorari in this case, we shall present a statement of the facts shown by the record. We shall then briefly demonstrate that the judgments below are not erroneous.

Statement of Facts.

Respondent's intestate, Ingram M. Stainback, was governor of the Territory of Hawaii for nine years, longer than any other governor in the history of the Territory, and on his retirement from that office was a justice of the Supreme Court of Hawaii for eight years. See memorial resolution at 44 Hawaii 709.

Governor Stainback died intestate on April 12, 1961.

This action was filed by petitioners on December 8, 1961. The gist of petitioners' asserted claim, as disclosed by the complaint and Exhibit "A" thereto (a copy of a Statement of Claim of Creditors made by petitioners to, and rejected by, Governor Stainback's administrator) is [R. pp. 2-10][1]:

> Governor Stainback's wife, Cecile White Stainback, died on October 11, 1949. After her death, Governor Stainback destroyed her will, in which she had bequeathed all her property to her parents, and concealed property belonging to her ("including substantial items of community property") from the administrator of her estate. On February 19, 1952, the net estate of Mrs. Stainback was distributed one-half to petitioners and one-half to Governor Stainback. Petitioners prayed that a con-

[1] The estate was distributed one-half to Governor Stainback and one-fourth each to the estates of the

structive trust be imposed on Governor Stainback's estate to the extent necessary to cover petitioners' claim and that Governor Stainback's administrator be required to account to them for all property in the Governor's estate allegedly traceable to the community property and personal property of Mrs. Stainback which was allegedly "fraudulently withheld" by Governor Stainback from her estate [R. p. 4].[2]

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mother and father of petitioners. Petitioners allege that the net estates of their parents were ultimately distributed to them [R. p. 7].

[2]As points of information: Hawaii had a community property law only between 1945 and 1949. A 1949 statute dissolved every marital community existing and provided that existing community property and the profits and substitutions thereof shall be governed by Chapter 320 of the *Revised Laws of Hawaii* (1955). See note preceding that chapter at 2 *Revised Laws of Hawaii* 1589 (1955). Section 320-1 of the *Revised Laws of Hawaii* establishes a rebuttable presumption that all property, real and personal, "acquired in the name of the husband or of the wife, without regard to the time of acquisition thereof, is the separate property of the spouse in the name of whom the same shall have been acquired". Section 320-19 of the *Revised Laws of Hawaii* provides that upon the death of a spouse, one-half of the community property shall continue to belong to the survivor and the other half shall pass in accordance with testamentary disposition by the decedent or, in the absence of such disposition, to the heirs of the decedent. In the absence of issue and when there is a surviving parent (as was the case here), a surviving husband takes one-half of the estate by inheritance. *Revised Laws of Hawaii*, Sec. 318-4(c) (1955). Hawaii also has estates by dower and curtesy granting the husband a one-third fee interest in the wife's personal property. *Revised Laws of Hawaii*, Ch. 310 and Sec. 310-1o (1955).

This action was brought more than twelve years after Mrs. Stainback's death and the alleged wrong of Governor Stainback, almost ten years after the close of Mrs. Stainback's estate, and after the death of the alleged wrongdoer and best, if not only witness for the defense.

On January 16, 1962, a notice to take the deposition upon oral examination of petitioner Georgia McPheeters was filed [see entry in district court docket, R. p. 49]. The circumstances concerning the taking of Mrs. McPheeters' deposition are set forth in the "Affidavit of Howard S. Smith re Costs and Legal Fees incurred by Defendant" [R. pp. 73-78] and the "Supplemental Affidavit of Howard S. Smith re Employment of Firm of Mitchell, Silberberg & Knupp" [R. pp. 109-113], and are as follows:

Since Mrs. McPheeters was a resident of Los Angeles County, California, her deposition was set by stipulation with her attorney to be taken in Los Angeles, California, on Saturday, January 27, 1962. Later, at the request of Mrs. McPheeters' attorney and Mrs. McPheeters, it was agreed that her deposition would be taken in Honolulu on the same date.

Mrs. McPheeters' attorney, however, refused to stipulate in writing that Mrs. McPheeters would produce certain documents at her deposition in Honolulu, apparently on the grounds that he was not able to communicate with Mrs. McPheeters. Because of what respondent's attorneys considered to be the unreasonable refusal of Mrs. McPheeters and her attorney to produce at her deposition in Honolulu documents which she could be compelled to produce were her deposition taken in Los Angeles, and because her deposition had been

changed from Los Angeles to Honolulu at her and her attorney's request, respondent's attorneys notified petitioners' attorneys that Mrs. McPheeters' deposition would be taken in Los Angeles on notice at the previously agreed time. A formal notice to that effect was prepared and filed in Honolulu. A certified copy of that notice was filed in the United States District Court for the Southern District of California, Central Division, under Civil Action File No. 646-Misc. and a subpoena duces tecum issued, which was served on Mrs. McPheeters in Los Angeles County. It was only after the service of that subpoena duces tecum that Mrs. McPheeters agreed in writing to produce those documents in Honolulu. Mrs. McPheeters' deposition was taken in Honolulu on Saturday, January 27, and Sunday, January 28, 1962 [see R. pp. 73-78 and 109-113].

On January 31, 1962 petitioners filed and served written interrogatories. Respondent filed answers to those interrogatories on February 26, 1962 and an amended answer on March 9, 1962 [see entries in district court docket, R. p. 49].

On June 15, 1962, respondent filed a motion, denominated a motion to dismiss or for a more definite statement, which squarely put into issue the merits of this action and which was in fact and effect a motion for summary judgment [R. pp. 53-56]. Included in the grounds of that motion were the following:

> "5. It appears on the face of the complaint that the claim, if any, is barred by laches and delay of Plaintiffs."
>
> "6. The claim, if any, arose almost thirteen (13) years prior to the filing of the complaint

herein, and the action is therefore barred by the State of Hawaii's six year statute of limitation to recover personal property and ten year statute of limitation to recover real property."

"7. The Plaintiffs are barred by res judicata."

"8. The Plaintiffs' claim is entirely conjectural and without any foundation in fact." [R. p. 55.]

On July 2, 1962, the deposition of petitioner Georgia McPheeters was filed in the district court [see entry in district court's docket, R. p. 49].

On July 6, 1962, petitioners' attorney, E. D. Crumpacker, Esq., filed a motion for leave to withdraw as counsel for petitioners [R. pp. 57-58]. On July 12, 1962, a hearing was had on Mr. Crumpacker's motion; petitioner McPheeters personally participated at that hearing [see R. p. 142, lines 11-19; p. 144, line 15, to p. 148, line 22; p. 151, line 20, to p. 153, line 9; p. 154, line 22, to p. 155, line 11; p. 158, line 11, to p. 159, line 10; p. 163, line 6, to p. 164, line 1; p. 166, lines 2-24, and p. 172, lines 3-17]. Respondent opposed Mr. Crumpacker's motion [R. p. 162, lines 15-19]. After hearing both Mr. Crumpacker and Mrs. McPheeters, the district court conditionally granted Mr. Crumpacker leave to withdraw. The district judge, however, took great pains to protect petitioners' rights. In addressing Mrs. McPheeters, he pointed out that he did not "know enough about the facts and cannot know enough about the facts until the case is tried to say whether or not what was done at that time affects your own particular claim" [R. p. 161, lines 22-25]; he ordered Mr. Crumpacker to notify each petitioner other than Mrs. McPheeters, individually, in writing, that

there would be a further hearing on his motion for leave to withdraw, so that each petitioner might have an opportunity to appear and be heard, either personally or by counsel; he carefully and in detail advised Mrs. McPheeters that Mr. Crumpacker would be permitted to withdraw if petitioners made no further showing, but that "if you or any of the rest of them at that time wish to have the matter heard, I will formally consider anything which you or any of the rest of them wish to offer. . . ." [R. p. 169, lines 9-11; pp. 167-170]. The district judge conditioned Mr. Crumpacker's withdrawal on his notifying in writing all petitioners other than Mrs. McPheeters that his motion would be heard on Friday, July 20, 1962, at 9:00 o'clock a.m. [R. p. 167, line 20, to p. 168, line 8, and p. 170, lines 8-11], and on his sending each petitioner a copy of the then pending motion of respondent to dismiss the action with notification that that motion would be heard on September 4, 1962, at 9:00 o'clock a.m., so that, if Mr. Crumpacker's motion to withdraw were finally granted, petitioners would know that they had to obtain new counsel and so that there would be adequate time to select new counsel and for new counsel to prepare [see R. p. 170, line 20, to p. 171, line 18; p. 173, line 1, to p. 174, line 18].

On July 20, 1962, the district court granted Mr. Crumpacker's motion for leave to withdraw [see minutes of district court for July 20, 1962, R. p. 136], and a formal written order to that effect was filed on July 26, 1962 [R. pp. 59-60].[3]

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[3]Mr. Crumpacker's notice to petitioners is not included as a part of the record on appeal. The docket of

On August 30, 1962, petitioner's new counsel, Brahan Houston, Esq., filed his appearance [R. pp. 24-25] and a notice of dismissal—purportedly without prejudice under Rule 41(a)(1) of the Federal Rules of Civil Procedure [R. pp. 61-62].

The same date petitioners purported to dismiss this action in the district court, they commenced in the Circuit Court of the First Circuit of the State of Hawaii a new suit based on the same claim asserted in this action. The defendants in the state court action were Judge McLaughlin as administrator of the estate of Governor Stainback, and the Cooke Trust Company, Ltd., which had been administrator of Mrs. Stainback's estate.[4]

On September 7, 1962, respondent moved to strike the notice of dismissal filed by petitioners, or in the alternative, that the court permit dismissal by petitioners only on just and reasonable terms and conditions [R. pp. 63-64]. On September 17, 1962 the district court "ruled that the notice of dismissal stand, conditioned upon the payment to defendant of his costs, etc., and if an agreement on the amount cannot be reached, then

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the district court indicates that this notice and a certificate of mailing were filed on July 13, 1962 [R. p. 49].

[4]The various documents filed in the state court, consisting of a summons and complaint, notice of dismissal, motion and affidavit to amend notice of dismissal and notice of hearing, and order denying motion to amend notice of dismissal were filed in the district court. [See entry in district court's docket R. p. 50.] They were included as a part of the record on appeal in the court of appeals and respondent has requested the clerk of the court of appeals to certify them to this court.

hearing on the matter be set for November 1, 1962 at 9 a.m." [See minutes of district court at R. p. 136 and entry in district court docket at R. p. 49]. A written order to that effect, which also provided that counsel for the respective parties should confer in an attempt to agree on the amount of costs was filed on October 1, 1962 [R. pp. 65-66].

Respondent filed memoranda of costs and attorneys' fees and affidavits with respect thereto on November 1 and November 8, 1962 [R. pp. 67-69; 70-72 and 73-78]. A supplemental affidavit was filed on December 17, 1962 [R. pp. 109-113].

At a hearing on November 8, 1962, the district judge made it clear that in his opinion the only basis for a dismissal was under Rule 41(a)(2) of the Federal Rules of Civil Procedure, and that "unless otherwise specified in the order of dismissal under this paragraph, *it is without prejudice.*" (Emphasis added.) [R. p. 176, lines 3-10.] After considering several factors, including that respondent had incurred out-of-pocket costs of $1,467.25, attorneys' fees of a reasonable value of $7,000.00 ("without going into the time spent on research and the two hearings on motions and the research on the Motion to Strike and so forth") [R. p. 177, lines 17-19], and that petitioners intended to file another action and that respondent had obtained value from the attorneys' fees expended in this action that would inure to her benefit in such a subsequent action, the district court set the amount of $4,967.25 as the amount to be paid by petitioners to respondent as a condition of the voluntary dismissal of this action without prejudice [see R. p. 177, line 1, to p. 178, line 11]. That the district judge carefully considered the evidence

before setting the payment of that sum as the condition of dismissal without prejudice is shown further by his remarks in a subsequent hearing [see R. p. 192, line 8, to p. 194, line 24].

On November 29, 1962, a written supplemental order on respondent's motion to strike petitioners' notice of dismissal was filed [R. pp. 94-95]. This order was amended in open court on December 19, 1962 to correct it and show clearly the basis on which the district court ruled [see transcript of hearing of that date, R. p. 202, line 13, to p. 204, line 14; entry in district court docket, R. pp. 50-51, and the district court's minutes, R. p. 138]. That supplemental order as so amended provides:

> "It Is Hereby Ordered that the Plaintiffs jointly and severally pay to the Defendant or his legal successor within thirty (30) days from the entry hereof, the sum of Four Thousand Nine Hundred Sixty-Seven and 25/100 Dollars ($4,967.25) for the costs and attorneys' fees incurred by Defendant in this matter; and in the event the Plaintiffs shall fail to meet this condition, this cause will stand dismissed with prejudice for failure to comply with terms and conditions of court."

On November 19, 1962, more than two and one-half months after petitioners filed their notice of dismissal and eleven days after the district court's ruling that petitioners' dismissal of this action without prejudice was to stand on condition that they pay respondent's cost and expenses in the amount of $4,967.25, petitioners filed: (1) a motion to amend the complaint; (2) a document entitled "Plaintiffs' Election to Continue On In This Court and Cause"; and (3) a mo-

tion for Judge Pence to recuse himself "because of bias and prejudice on the part of the Honorable Martin Pence towards plaintiffs and their cause" together with an affidavit of petitioners' attorney in support thereof [R. pp. 79-87].

The next day, November 20, 1962, petitioners filed a document entitled "Plaintiffs' Joinder in Defendant's Motion to Strike Plaintiffs' Dismissal" [R. pp. 88-89].

An affidavit of prejudice by petitioner Georgia McPheeters was filed on November 29, 1962 [R. pp. 90-93]. The same day, Judge Pence denied the motion that he recuse himself [see entries in docket of district court, R. p. 50, and in district court's minutes, R. p. 138], and on December 5, 1962, a written order denying the motion was signed and filed [R. pp. 97-98].

Petitioners then filed motions to set aside the district court's orders [R. pp. 99-101; 106-108]. On December 19, 1963, these motions were denied and, after an extensive colloquy between the court and counsel for petitioners, the order dated November 29, 1962 was amended as above stated [see entries in the district court's docket and minutes, R. pp. 50 and 138, and R. pp. 182-204].

On January 9, 1963, this action was ordered dismissed with prejudice for failure of petitioners to fulfill the terms and conditions fixed by the court within the prescribed time [R. pp. 12-15].

ARGUMENT.

I.

MANY OF THE FACTUAL STATEMENTS SET FORTH IN THE PETITION ARE NOT SUPPORTED BY THE RECORD, OR ARE INACCURATE.

We realize that present counsel for petitioners commenced their representation of petitioners only lately, first appearing in connection with the filing of a petition for rehearing in the court of appeals.[5] For this reason, they may not be fully familiar with the facts in this matter. There are certain factual statements made in the petition which are either wholly unsup-

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[5]The record indicates that petitioners' present counsel are the sixth attorneys petitioners have retained or consulted in connection with various phases of this action. This action was filed by Mr. Crumpacker, who was replaced as attorney of record by Mr. Houston. It appears from the "Affidavit in Opposition to Motion to Dismiss Appeal and Exhibit 'A'" of Georgia McPheeters, filed in the court of appeals (which respondent has asked the clerk of the court of appeals to certify to this Court as part of the record), that Mrs. McPheeters also consulted with "the office of the late Mr. Jerry Geesler [sic] in Los Angeles" and with Howard K. Hoddick, Esq., of Honolulu, concerning petitioners' appeal. Mr. Crumpacker's and Mrs. McPheeters' statements at the hearing on Mr. Crumpacker's motion for leave to withdraw indicate that the petitioners residing in Missouri extensively consulted with, if not retained, Lon Haymes, Esq., an attorney in Springfield [R. p. 151, line 20, to p. 153, line 8]. Exhibit 3 to Mrs. McPheeters' deposition filed in the district court is a letter to respondent's Los Angeles attorneys written by Don Edwin Raney, Esq., a Long Beach, California, attorney, for Mrs. McPheeters in connection with her deposition.

ported by the record, or are inaccurate. Lest the court be misinformed, we think it necessary to correct those statements.

A. There Are Direct Statements of Fact Which Are Unsupported by the Record.

1. The petition, at page 4, states that the district court set over the hearing on Mr. Crumpacker's motion to withdraw to September 4, 1962, but nonetheless permitted him to withdraw on July 26, 1962. The docket and minutes of the district court show clearly that the hearing on Mr. Crumpacker's motion to withdraw was continued to July 20, 1962, and that it was the hearing on the motion to dismiss that was continued to September 4, 1962 [R. pp. 49 and 136].

2. The petition, at page 4, states that during the period of time between July 26 and August 30, 1962, petitioners were entirely without an attorney. This statement is entirely without support in the record, and is contrary to the clear implications of Mrs. McPheeters' statements in her affidavit in the court of appeals and to Judge Pence. See footnote 5, *supra*.

3. The petition, at pages 4 to 5, states that Mr. Houston was never authorized to file a notice of dismissal of this action. This statement is totally unsupported by the record. It is repeated at page 16 of the petition, and apparently forms the basis for a substantial part of petitioners' argument. Mrs. McPheeters, the petitioner who has actively controlled this litigation throughout, was personally present at the argument in the court of appeals on respondent's motion to dismiss the appeal and was personally present when the court of appeals called the case for argument on the

merits: Mrs. McPheeters personally swore to an affidavit of prejudice against Judge Pence *after* the notice of dismissal had been filed and he had specified the conditions complained of [R. pp. 90-93]: she personally swore to an affidavit in opposition to respondent's motion to dismiss the appeal, in which she testified to many communications with Mr. Houston pertaining to this matter. Yet, no claim was ever made that Mr. Houston did not have authority to dismiss this action until present counsel for petitioners filed the petition for rehearing in the court of appeals.

4. At page 5 the petition states that at the time the notice of dismissal was filed defendant's preparation had not preceded beyond the point of taking depositions in Honolulu. This statement is clearly contrary to the facts shown in the record. See the memoranda of costs and attorneys' fees [R. pp. 67-69, 70-72], the "Affidavit of Howard S. Smith Re Costs and Legal Fees Incurred by Defendant" [R. pp. 73-78], the "Supplemental Affidavit of Howard S. Smith Re Employment of Firm of Mitchell, Silberberg & Knupp" [R. pp. 109-113], showing the extraordinary nature of the expenditures required in connection with Mrs. McPheeters' deposition, and the entries in the district court's docket [R. p. 49] showing that respondent had prepared and filed answers and amended answers to written interrogatories of petitioners. Moreover, respondent's attorneys had prepared and filed a motion to dismiss which raised factual and legal issues going directly to the merits of the case. [R. pp. 53-56].

5. At page 5 the petition states that Mrs. McPheeters "voluntarily" came to Honolulu to give her deposition "for the purpose of cooperating with defendants". This statement is contrary to the facts on the record

which are set out in some detail in respondent's statement of facts and which demonstrate a *lack* of cooperation by Mrs. McPheeters.

6. At page 6 the petition states that a witness is available who was personally present when Governor Stainback allegedly destroyed his wife's will. This statement is wholly unsupported by the record.[6]

7. At page 6 the petition states that true copies of Mrs. Stainback's will are available and can be offered in evidence with proper foundation. This statement is wholly without support in the record.

8. At page 6 the petition states that the property left by Mrs. Stainback "was substantially all in the nature of community property." This statement is wholly

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[6]Petitioner McPheeters claimed in her deposition that she was an eye witness to the destruction by Governor Stainback of Mrs. Stainback's will. She also testified repeatedly that petitioners intentionally refrained from suing Governor Stainback during his lifetime in connection with the claimed destruction of Mrs. Stainback's will and the alleged concealment by him of her property. Of course, these statements, if true, would conclusively establish the defense of laches. Mrs. McPheeters' deposition also revealed that she enjoyed a friendly relationship with Governor Stainback to the time of his death. Her deposition was filed in the district court; should this Court or counsel for petitioners wish to augment the record by certifying Mrs. McPheeters' deposition, appropriate references thereto are as follows: p. 131, line 14, to p. 140, line 9; p. 161, line 4, to p. 165, line 7; p. 191, line 21, to p. 193, line 5; p. 213, line 14, to p. 217, line 17; p. 279, lines 10-25; p. 280, line 12, to p. 292, line 3; p. 324, line 10, to p. 328, line 14 (in which Mrs. McPheeters expressly admits that "a contributing factor" to her signing the papers to institute this suit was the fact that Governor Stainback was dead); p. 345, line 25, to p. 347, line 20, and p. 360, line 17, to p. 364, line 9.

without support in the record. In view of the short life of the Hawaii community property law and the statutory presumption in favor of separate property, there is a rebuttable presumption to the contrary (see note 2, *supra*). There is nothing in the record to rebut this presumption.

9. At pages 7 and 14 of the petition, statements are made to the effect that Mr. Houston "sacrificed his health" and "became disabled." These statements are wholly without support in the record. The attorneys for respondent had no information of any such disability until receiving a copy of the petition.

B. There Are Insinuations of Facts That Are Unsupported by and Contrary to the Record.

Petitioners seek, by innuendo, to have this Court infer that there was something sinister and unethical in Mr. Crumpacker's withdrawal. See petition, pages 4 and 7. The reasons presented by Mr. Crumpacker to the district court in support of his request that he be relieved, and on the basis of which the court granted that request were that subsequent to his retainer, he discovered facts, which had not been disclosed to him at the time he was employed, which related to *acts taken by petitioners* (including much correspondence between them and attorneys for them and Governor Stainback and Mrs. Stainback's administrator), which tended materially to weaken the case, and which would have influenced his initial decision to represent petitioners [see R. p. 143, lines 10-13; p. 155, lines 14-18; p. 156, line 24, to p. 161, line 11; p. 164, lines 9-20, and p. 165, line 13, to p. 166, line 1]. There is no evidence in the record in any way supporting any inference of wrongdoing by Mr. Crumpacker.

II.

NO GROUNDS EXIST FOR THE ISSUANCE OF A WRIT OF CERTIORARI.

A. This Case Presents None of the "Special and Important Reasons" for Granting a Writ of Certiorari Specified in Rule 19 of the Revised Rules of This Court.

The outcome of this case is of interest solely to the litigants involved. There are no questions of public or federal law to be settled; there are no conflicts between the courts of appeals to be resolved; there is no conflict with any decision of this Court, nor has there been any departure from the accepted or usual course of judicial proceedings. To the contrary, as we shall show, the district court and court of appeals acted in accordance with well-established precedent. The circumstances which this Court has generally required for the issuance of a writ of certiorari are wholly absent in this case. See *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U. S. 70 (1955); *S. S. Monrosa v. Carbon Black Export, Inc.*, 359 U. S. 180 (1959); *Rudolph v. United States*, 370 U. S. 269 (1962).

B. The Judgments of the Court of Appeals and District Court Are Not Erroneous.

1. Judge Pence Correctly Refused to Recuse Himself.

Petitioners do not assign as error the affirmance by the court of appeals of the order of Judge Pence denying petitioners' motion that he recuse himself. That order was not erroneous; it was in accordance with the applicable statute, 28 U. S. C., Section 144, the decisions of this Court, *Ex parte American Steel Barrel Co.*, 230 U. S. 35 (1913) and *Berger v. United*

States, 255 U. S. 22 (1921), and the decisions of all the courts of appeals that have ruled on the subject. See the cases cited in the opinion of the court of appeals at page 6 of the appendix to the petition.

2. The Conditional Order of Dismissal Was Not Erroneous and the Conditions Imposed Were Within the Discretion of the District Judge.

Petitioners' attempt to dismiss this action without prejudice came *after* respondent had incurred substantial expense in preparing her defense: *after* respondent had taken the deposition of petitioner Georgia McPheeters at substantial expense: *after* petitioners had themselves propounded written interrogatories and respondent had answered those interrogatories: and *after* respondent had filed a motion, in fact for summary judgment although denominated a motion to dismiss, which squarely raised the merits of the case and was based largely on matters outside the pleadings. The district judge's refusal to permit a voluntary dismissal without prejudice and without conditions at that late stage of the litigation was not erroneous, but was in accordance with the spirit of Rule 41(a) of the Federal Rules of Civil Procedure and supported by ample precedent. *Harvey Aluminum, Inc. v. American Cyanamid Co.*, 203 F. 2d 105, 107-108 (2d Cir.), cert. denied, 345 U. S. 964 (1953); *Littman v. Bache & Co.*, 252 F. 2d 479 (2d Cir. 1958); *Butler v. Denton*, 150 F. 2d 687 (10th Cir. 1945); *Tele-Views-News Co. v. S. R. B. TV Publishing Co.*, 28 F. R. D. 303, 306-308 (E. D. Pa. 1961); *Baker v. Sisk*, 1 F. R. D. 232 (E. D. Okla. 1938).

The district court has broad discretion in devising and imposing the terms and conditions of a dismissal

without prejudice under Rule 41(a)(2). See *American Cynamid Co. v. McGhee*, 317 F. 2d 295, 298 (5th Cir. 1963); *Blue Mountain Construction Co. v. Werner*, 270 F. 2d 305 (9th Cir. 1959), cert. denied, 361 U. S. 931 (1960); *Standard Natl. Insurance Co. v. Bayless*, 272 F. 2d 185 (5th Cir. 1959); *Diamond v. United States*, 267 F. 2d 23 (5th Cir.), cert. denied, 361 U. S. 834 (1959). This discretion includes the right to impose as a condition of dismissal the payment by the plaintiff of the defendant's attorneys' fees as well as costs. In the circumstances of this case, the amount set by the district judge was not an abuse of discretion. See *Federal Savings & Loan Insurance Corp. v. Reeves*, 148 F. 2d 731 (8th Cir. 1945), in which an award of attorneys' fees and expenses in the amount of $6,741.00 was held within the discretion of the trial court; *New York C. & St. L. R. R. v. Vardaman*, 181 F. 2d 769, 771 (8th Cir. 1950); *Derman v. Stor-Aid, Inc.*, 7 Fed. Rules Serv. 41a.22, case 6 (S.D. N.Y. 1943) in which a voluntary dismissal without prejudice was conditioned on the payment of $5,000.00 by plaintiffs to defendants. See 5 Moore, *Federal Practice*, Par. 41.06 (2d ed.).

The order of the district court directing that this action be dismissed without prejudice if petitioners complied with the conditions and terms set by the court, but that it be dismissed with prejudice if petitioners did not comply with those terms and conditions was correct. The courts of appeals have affirmed identical orders without any question of their propriety. *De Filippis v. Chrysler Sales Corp.*, 116 F. 2d 375 (2d Cir. 1940); *Stern v. Inter-Mountain Telephone Co.*, 226 F. 2d 409 (6th Cir. 1955). A similar order was also

made in *Gold v. Geo. T. Moore Sons, Inc.*, 3 F.R.D. 201 (S.D. N.Y. 1943), cited on page 10 of the petition.

None of the authorities cited by petitioners discloses any reason why a writ of certiorari should issue in this case. The law review note on which petitioners appear to place great reliance, *Exercise of Discretion in Permitting Dismissals without Prejudice under Federal Rule 41(a)*, 54 Colum. L. Rev. 616 (1954), actually more strongly supports the action of the district court than the arguments of petitioners. That note points out that the trial court's action in connection with voluntary dismissals "is discretionary [and] it will not be disturbed on appeal absent a clear showing of abuse", *id.* at 617, and that the terms and conditions imposed usually include allowance of reasonable expenses in addition to standard taxable costs, so that defendant will be compensated for the expense to which he has been put, *id.* at 618.

> "On the whole, the imposition of expenses is a salutary gloss on Rule 41(a)(2) in that it probably deters prospective plaintiffs from harassing defendants with unmeritorious lawsuits which they never intend to bring to trial, while, at the same time, justifiably compensating a defendant who has incurred expenses in the preparation of his case." *Id.* at 620. See also *id.* at 618, n. 17.

None of the cases cited on pages 10 and 11 of the petition in any way supports the argument that the district judge abused his discretion in requiring as terms and conditions of voluntary dismissal without prejudice that petitioners pay respondent's expenses and one-half of the reasonable attorneys' fees respondent in-

curred for only a portion of the services rendered by her attorneys [see R. p. 177, lines 1-20; p. 178, lines 3-11]. For this reason, those cases will not be discussed individually, except to point out that *DeFillipis v. Chrysler Sales Corp., supra*, 116 F. 2d 375, cited at page 10 of the petition squarely supports the judgments of the district court and court of appeals at bar. See also *Hawkins v. Lindsley*, 327 F. 2d 356 (2d Cir. 1964).

Except for *American Cyanamid Co. v. McGhee, supra*, 317 F. 2d 295, which supports the judgments below, the cases cited at pages 12 and 13 of the petition have nothing to do with dismissals under Rule 41(a) of the Federal Rules of Civil Procedure, and for that reason will not be discussed individually.

There is no merit whatever in petitioners' argument that the judgments of the district court and the court of appeals were erroneous because Mr. Houston in some way lacked authority. As has already been pointed out, although petitioner McPheeters was personally present before the court of appeals on two occasions and filed an affidavit of prejudice in the district court and an affidavit in the court of appeals, no claim was made that Mr. Houston in any way lacked authority until a petition for rehearing in the court of appeals was filed by petitioners' present counsel.

There is a rebuttable presumption that an attorney is authorized to act for his client, and that presumption applies to the compromise or dismissal of an action. See *Gagnon Co. v. Nevada Desert Inn, Inc.*, 45 Cal. 2d 448, 460-461, 289 P. 2d 466 (1955); *Pacific Tel. & Tel. Co. v. Fink*, 141 Cal. App. 2d 332, 338, 296 P. 2d 843 (1956); *United States v. Grain Importers, Ltd.*, 144 F. 2d 921, 925 (1st Cir. 1944); *Para-*

dise v. Vogtlandische Maschinen-Fabrik, 99 F. 2d 53 (3d Cir. 1938).

> "We will assume that members of the bar formally appearing for litigants before us and in other federal courts are authorized to so appear. (Hill v. Mendenhall, 88 U.S. 453, 21 Wall. 453, 454, 22 L. Ed. 616), and will continue to indulge in that assumption until the litigants or such attorneys formally and under oath challenge the truth of such assumption, or proof is submitted challenging the truth of such assumption, sufficient to warrant inquiry regarding such authority." *Department of Water & Power v. Anderson*, 95 F. 2d 577, 580 (9th Cir. 1938)

Conclusion.

Petitioners have shown no reason for invoking the extraordinary jurisdiction of this Court on certiorari. Indeed, petitioners' conduct throughout this litigation has been such as to wholly justify the orders of the district court permitting only a conditional dismissal without prejudice and dismissing this action with prejudice on failure of petitioners to meet the conditions specified. Petitioners have persistently and maliciously maligned and abused the district judge. At every change of attorneys by petitioners, they have cast unwarranted aspersions on the character and ability of their previous counsel. They have vexatiously multiplied expenses in this action. They filed a complaint against respondent and another in the Hawaii state court, based on the same claim asserted in this action, which was indecent and scandalous. They then dismissed the state court action voluntarily and later sought to revive it against respondent. In asking the district court to

set aside its orders, petitioners did not even attempt to make a showing that their claim in this action is meritorious. Petitioners' conduct throughout the proceedings in the district court and the court of appeals has shown a bent and determination by them to abuse and misuse the judicial process to vent their unfounded spleen on the late Governor Stainback and on the district judge.

For all of the reasons stated above, we respectfully submit that neither the district judge nor the court of appeals committed error. Petitioners have made no showing that the district judge in any way abused his discretion. We respectfully urge that the petition for a writ of certiorari be denied.

Respectfully submitted.

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